(3)

Supreme Court, U.S.
FILED
MAR 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1255

In the Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, ET AL., PETITIONERS

v.

JAMES M. LOVE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
DONALD A. CARR
Acting Assistant Attorney General
ANNE S. ALMY
JOHN A. BRYSON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

19 pp

QUESTION PRESENTED

Whether the users of an agricultural pesticide registered under the provisions of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136 *et seq.*, may obtain judicial review of an emergency suspension of the pesticide's federal registration even though the holders of the registration have withdrawn their administrative challenge to the emergency suspension.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Block v. *Community Nutrition Institute*, 467 U.S. 340 (1984)	13, 14
Dow Chemical Co. v. *Blum*, 469 F. Supp. 892 (E.D. Mich. 1979)	3, 11
FDIC v. *Mallen*, 108 S. Ct. 1780 (1988)	5
McGill v. *EPA*, 593 F.2d 631 (1979)	13
Merrell v. *Thomas*, 807 F.2d 776 (9th Cir. 1986), cert. denied, 108 S. Ct. 145 (1987)	12
Nagel v. *Thomas*, 666 F. Supp. 1002 (W.D. Mich. 1987)	11
Northwest Food Processors Ass'n v. *Reilly*, Nos. 88-4339, 88-4389 (9th Cir. Mar. 20, 1989)	5

Statutes, regulation and rule:

Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136 *et seq.*	2
§ 2(bb), 7 U.S.C. 136(bb)	2
§ 2(*l*), 7 U.S.C. 136(*l*)	3
§ 3(a), 7 U.S.C. 136a(a)	2
§ 3(c)(5), 7 U.S.C. 136a(c)(5)	2
§ 3(d), 7 U.S.C. 136a(d)	2
§ 4, 7 U.S.C. 136b	2
§ 6, 7 U.S.C. 136d	2
§ 6(b), 7 U.S.C. 136d(b)	2
§ 6(c), 7 U.S.C. 136d(c)	12
§ 6(c)(1), 7 U.S.C. 136d(c)(1)	3

Statutes, regulations and rule—Continued: Page

§ 6(c)(2), 7 U.S.C. 136(c)(2) ..... 3, ,4, 5, 7, 8, 9, 10, 11
§ 6(c)(3), 7 U.S.C. 136d(c)(3) 3, 8, 10, 11
§ 6(c)(4), 7 U.S.C. 136d(c)(4) 3, 4, 7, 8, 11, 12, 13
§ 12(a), 7 U.S.C. 136j(a) 2
§ 16, 7 U.S.C. 136n 3
40 C.F.R. Pt. 164, Subpt. D 4
Section 164.131(a) 4
S. Ct. Rule 19.6 8

Miscellaneous:

51 Fed. Reg. (1986):
p. 36, 634 4
pp. 36,635-36,636 5
p. 36,635 3
pp. 36,636-36,637 4
p. 36,636 5
p. 36,650 4
52 Fed. Reg. (1987):
p. 4963 6
p. 11,119 6
S. Rep. No. 838 (Pt. II), 92d Cong., 2d Sess. (1972) 12
S. Rep. No. 970, 92d Cong., 2d Sess. (1972) 12

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1255

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, ET AL., PETITIONERS

v.

JAMES M. LOVE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 838 F.2d 1059. The amended opinion of the court of appeals is reported at 858 F.2d 1347. The opinion of the district court (Pet. App. 47a-65a) is reported at 668 F. Supp. 1443.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 1988. Petitions for rehearing were denied on September 28, 1988. Pet. App. 42a-44a. On December 21, 1988, Justice O'Connor granted petitioners an extension of time to and including January 26, 1989, within which to file a petition for a writ of certiorari. The petition for a writ of certiorari was filed on January 26, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.*, is the federal legislative scheme for regulating chemicals used as pesticides in the United States. The statute imposes restrictions on both the marketing and the use of products containing pesticides. Any person wishing to distribute or sell a pestieide must obtain a registration from the Environmental Protection Agency (EPA) for each product. 7 U.S.C. 136a(a).[1] EPA may limit the registration in different ways, such as restricting the pesticide to specific use or requiring that it be used only by applicators certified by EPA or state agencies. 7 U.S.C. 136a(d), 136b. The product label must bear those limitations, and it is a violation of FIFRA to use a pesticide contrary to the label restrictions. 7 U.S.C. 136j(a).

Under Section 6 of FIFRA, 7 U.S.C. 136d, EPA is authorized to initiate cancellation proceedings if it appears that the pesticide no longer meets the criterion that it not have "unreasonable adverse effects on the environment." The registrants, as well as other adversely affected persons, have the right to request an administrative adjudicatory hearing on the proposed cancellation and to obtain judicial review. 7 U.S.C. 136d(b).

Pending cancellation, EPA may take action to limit or prohibit the sale, distribution, or use of a pesticide. The Administrator of EPA may suspend the registrations to

---

[1] Applicants must establish that the use of the pesticide will not cause "unreasonable adverse effects on the environment." 7 U.S.C. 136a(c)(5). That test requires EPA to weigh the risks of pesticide use against the benefits. The term "unreasonable adverse effects on the environment" is defined as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." 7 U.S.C. 136(bb).

prevent an "imminent hazard" if he concludes that the risks of continued use during the time it takes to complete cancellation proceedings would outweigh the benefits. 7 U.S.C. 136(*l*), 136d(c)(1). The registrants, but no other persons, can prevent the suspension from going into effect by requesting a hearing, which must be conducted on an expedited basis. 7 U.S.C. 136d(c)(2). Section 6(c)(2), however, expressly provides that, if no registrant requests a hearing on suspension, the suspension order "shall take effect and shall not be reviewable by a court." 7 U.S.C. 136d(c)(2).

In addition, the Administrator may determine that an "emergency" exists such that the suspension must take effect immediately. 7 U.S.C. 136d(c)(3). For that determination, the Administrator weighs the risks and benefits for the time period necessary to complete suspension proceedings. See *Dow Chemical Co.* v. *Blum,* 469 F. Supp. 892, 901-902 (E.D. Mich. 1979); 51 Fed. Reg. 36,635 (1986). In that case, the registrants have the same rights discussed above to a hearing on the suspension. The order, however, remains in effect during the suspension hearing, and the participation of parties other than the registrant is limited to the filing of briefs. 7 U.S.C. 136d(c)(3).

The statute also prescribes the conditions under which the Administrator's decisions regarding suspension are subject to judicial review. As noted, Section 6(c)(2) provides that when no hearing on the suspension is requested by the registrants the order "shall not be reviewable by a court." 7 U.S.C. 136d(c)(2). In addition, Section 6(c)(4) provides that a final order on suspension following a hearing is reviewable under Section 16, 7 U.S.C. 136n, the general provision for judicial review, and further that "[a]ny order of suspension entered prior to a hearing before the Administrator shall be subject to immediate

review in an action by the registrant or other interested person with the concurrence of the registrant in an appropriate district court." 7 U.S.C. 136d(c)(4).[2]

2. On October 7, 1986, the Administrator issued a notice of intent to cancel registrations for products containing the pesticide dinoseb, which was principally used to control broadleaf weeds in a variety of crops throughout the United States. See 51 Fed. Reg. 36,650 (1986). That action was based on new information indicating a substantial health risk to applicators and others exposed to the chemical.

At the same time, the Administrator also issued an emergency suspension for all uses of dinoseb. 51 Fed. Reg. 36,634 (1986). The agency concluded that further use of dinoseb would present a serious and immediate risk of irreversible birth defects in unborn children of pregnant females, adverse reproductive effects such as decreased fertility and sterility in exposed males, and acutely toxic reactions. 51 Fed. Reg. 36,636-36,637 (1986). On the basis of the limited information available to EPA regarding the economic benefits of continued use of dinoseb, the Administrator weighed the risks against the benefits and concluded that the continued sale, distribution, and use of dinoseb products would pose an imminent hazard during the time required to conduct a cancellation hearing. 51

[2] EPA has also established by regulation a process for seeking reconsideration of suspension orders that have become final pursuant to Section 6(c)(2) of FIFRA. 40 C.F.R. Pt. 164, Subpt. D. Parties applying for reconsideration under Subpart D must present substantial new evidence that may materially affect the prior suspension and that could not have been discovered, with the exercise of due diligence, before the suspension order. 40 C.F.R. 164.131(a). If a party's submission meets that threshold, EPA will conduct an adjudicatory hearing leading to a decision whether to modify the suspension for the benefit of those parties. The suspension order ordinarily remains in effect, however, pending the completion of that process.

Fed. Reg. 36,635-36,636 (1986). He further concluded that an emergency existed requiring the agency to suspend the sale, distribution, and use of dinoseb products during the pendency of any hearing on the question of imminent hazard. 51 Fed. Reg. 36,636 (1986).

The suspension affected registrations for some 300 products containing dinoseb. Although four registrants exercised their right to a hearing on the question of suspension during the pendency of cancellation proceedings, they withdrew those requests within two weeks, and on October 30, 1986, the suspension order became final pursuant to Section 6(c)(2) of FIFRA, 7 U.S.C. 136d(c)(2). Pet. App. 5a.[3]

---

[3] Several registrants, however, requested a cancellation hearing; ultimately, that proceeding was settled without an evidentiary hearing when the registrants agreed to surrender their registrations and EPA agreed to allow transitional use of some of the remaining stocks of dinoseb products on certain crops grown in the Pacific Northwest. On June 10, 1988, that settlement was approved by the Administrator in a final order canceling the registrations. The Administrator's final order was attacked by the plaintiffs in this case (respondents here) in original actions brought simultaneously in the court of appeals and in the same district court that heard this case. Some of the petitioners here intervened in the district court action to challenge that portion of the order allowing use of existing stocks. The district court dismissed the action for lack of jurisdiction, and, in the alternative, concluded that the final cancellation order was valid in all respects. An appeal by the plaintiffs and a cross-appeal by the intervenors were consolidated for briefing and argument with the petition for review filed in the court of appeals presenting the same challenges. The court of appeals has recently issued an order, with opinion to follow, holding that jurisdiction over the petition for review lies in the court of appeals and affirming the action of the Administrator in its entirety. *Northwest Food Processors Ass'n* v. *Reilly*, Nos. 88-4339, 88-4389 (9th Cir. Mar. 20, 1989). Because respondents can still ask the Ninth Circuit or this Court to overturn the March 20 order, the present case is not moot. Cf. *FDIC* v. *Mallen*, 108 S. Ct. 1780, 1786 n.7 (1988).

3. Even though the suspension order became final on October 30, 1986, several months later—on April 3, 1987—a group of vegetable and fruit growers in the Pacific Northwest, who were dinoseb users but not registrants under the statute, brought suit to overturn the suspension insofar as it prevented them from using the pesticide on their crops. Pet. App. 6a-7a. They claimed that they were economically dependent on dinoseb because there was no practicable alternative and that measures could be taken to reduce the risk during the pendency of cancellation proceedings. Although the growers had invoked EPA's Subpart D procedures for relief from the suspension order (see note 2, *supra*) before seeking judicial review, their district court complaint sought review of the original suspension and not review of EPA's handling of the Subpart D request.[4]

After an expedited hearing, the district court enjoined the operation of the suspension as it applied to the grower respondents and imposed a set of restrictive conditions for the use of the pesticide. The district court concluded that it was authorized to review the suspension despite the waiver by the registrants of their administrative remedy. The

---

[4] EPA handled the Subpart D request differently with respect to the different crops on which dinoseb was used. EPA denied the request with respect to green peas and snap beans on the ground that the growers' submission had not met the threshold test of new evidence that may materially affect the suspension. 52 Fed. Reg. 11,119 (1987). Based on a materially different evidentiary showing from the information presented by the plaintiffs here, EPA granted a hearing under Subpart D for growers of dry peas, lentils, and chickpeas in the Palouse region of Eastern Washington and Idaho. 52 Fed. Reg. 4963 (1987). EPA had not yet acted on the growers' request with respect to the use of dinoseb on caneberries and cucurbits (cucumbers, yellow squash, and zucchini) at the time the district court entered its injunction. That order completely superseded any relief the agency could have given under Subpart D.

court held that the limited opportunity for judicial review "prior to" an administrative hearing of an emergency suspension provided in Section 6(c)(4) applied to this situation because a hearing had been requested but was never held. Pet. App. 54a-56a. The court then concluded that the suspension order was arbitrary and capricious because EPA, at the time suspension was ordered, had minimal information regarding the benefits of continued use of dinoseb in the Pacific Northwest. *Id.* at 58a-63a. In reaching that conclusion, the district court admitted into evidence and relied on extensive material outside the administrative record of the suspension, much of which had been produced in the several months after that decision. *Id.* at 61a-65a.

The Administrator took an expedited appeal from the district court's judgment. The court of appeals permitted petitioners, individual farmworkers and their organizational representatives, to intervene in the case. A divided court of appeals affirmed in part and reversed in part.

The majority first rejected the district court's distinction between cases in which no request for a hearing was filed and instances in which such requests are later withdrawn. Pet. App. 11a. The majority, however, perceived a distinction between emergency suspension orders that never become the subject of an administrative hearing, and therefore are not formally superseded by further orders, and nonemergency suspension orders, which are initially published as proposed orders and formally superseded by final orders after a hearing or waiver of that right. *Id.* at 13a-14a. In the majority's view, the preclusion of judicial review contained in Section 6(c)(2) applies only to the latter class of suspensions because that subsection refers only to orders that had not yet issued and had not become effective. *Id.* at 14a. For that reason, the majority dismissed

that express language of Section 6(c)(3) that makes Section 6(c)(2), including the preclusion of judicial review, applicable to emergency suspensions. Thus, the majority concluded that emergency suspension orders that never become the subject of an administrative hearing remain subject to judicial review under Section 6(c)(4) until the Administrator issues a final decision on cancellation. *Id.* at 14a-15a. The majority also affirmed the district court's holding that EPA, in deciding whether to issue a nationwide emergency suspension, erred by failing to investigate local economic impacts that appeared to be minor on the nationwide scale. *Id.* at 19a-31a.[5]

Judge Norris dissented, maintaining that the majority's distinction between emergency and ordinary suspensions was a "tortured and hypertechnical reading of the statute." Pet. App. 38a. He concluded that there was "no reason why Congress would make a distinction between the judicial reviewability of ordinary and emergency suspension orders." *Id.* at 39a. Judge Norris noted that, when no hearing is requested on a suspension, the only difference between an ordinary and an emergency suspension is that the former becomes effective five days later than the latter. *Ibid.* In his view, there was no sensible reason to allow that distinction to become the basis for permitting judicial review of an emergency suspension many months after it had been issued and after the available administrative procedure for challenging it had been waived. *Ibid.*

Petitioners, intervenors below, have petitioned for a writ of certiorari on jurisdictional grounds. The Administrator of the Environmental Protection Agency is a respondent under this Court's Rule 19.6.

---

[5] The panel vacated the injunction, however, on the ground that the statute gave the district court no equitable power to impose additional restrictions on the use of the pesticide. The district court could only issue a stay of the effect of the suspension. Pet. App. 33a.

ARGUMENT

We agree with petitioners that the decision below incorrectly reads FIFRA to provide for judicial review of emergency suspension orders when the registrants have requested but then abandoned an administrative hearing.[6] No other court of appeals, however, has considered the issue of the availability of judicial review in these circumstances. Furthermore, unlike petitioners, we do not think that this decision has resolved a federal question in a manner that conflicts with any decision of this Court because it rests on an analysis, however erroneous, of the specific statutory language of FIFRA. Finally, petitioners' fears concerning the impact of the decision on the exercise of the Administrator's emergency powers rest, at this point, on speculation about how the jurisdictional ruling of the court of appeals could influence future decisions. Although we acknowledge that the decision could possibly be a factor in those decisions, it will not have a uniform or predictable effect on future agency actions. Therefore, the petition for a writ of certiorari should be denied.

1. The court of appeals' construction of FIFRA's provisions for the suspension of pesticide registrations disregards the carefully crafted legislative reconciliation of the divergent interests of the public, the registrants, and the users of pesticide products. It is clear that Congress, in creating the administrative scheme for cancellation and suspension of pesticide registrations, intended to bar any judicial review of a suspension order that becomes final in the circumstances presented here. Indeed, the express language of FIFRA precludes review. Section 6(c)(2) provides that, when the registrant fails to request a hearing on

---

[6] We also agree with petitioners that the court of appeals erred in setting aside the suspension on its merits, but petitioners have not sought review of the merits in this Court, nor have we. See Pet. 8 n.6.

the question of suspension, the order suspending the registration "shall take effect and shall not be reviewable by a court." 7 U.S.C. 136d(c)(2). There is no doubt that a proposed suspension order becomes effective, final, and unreviewable on five days' notice if the registrants fail to request a hearing. Thus, the essential precondition for an unreviewable order is the waiver by the registrant of its right to a hearing, and that condition was satisfied in this case.[7]

Nor is any different conclusion required because EPA exercised its Section 6(c)(3) authority and issued the suspension on an emergency basis. Section 6(c)(3) expressly states that "paragraph (2) shall apply" when the Administrator issues an emergency order. The reference to "paragraph (2)" is to Section 6(c)(2), which in turn provides that suspension orders become unreviewable when the registrants waive their right to a hearing. The court of appeals has dismissed Section 6(c)(3) on the unpersuasive ground that the first sentence of Section 6(c)(2) literally refers only to suspension orders that need to be issued in order to take effect, that is, ordinary suspension orders, and not emergency orders, which have been issued and have already taken effect. Pet. App. 14a.

That reading assumes that Congress, having written a provision for issuance of a notice of intention to suspend and having expressly provided for finality and *unreviewability* when registrants waive their opportunity to obtain administrative review (Section 6(c)(2)), reached the entirely opposite conclusion with respect to an emergency suspension in the next paragraph of the statute,

---

[7] In this case, although a hearing was requested, the registrants withdrew the request shortly thereafter. The court of appeals quite correctly concluded that that situation should be treated no differently from the situation in which no request is ever filed. Pet. App. 11a, 36a n.2.

despite the express cross-reference to and incorporation of the previous paragraph. That assumption, we submit, is too implausible to be accepted without any indication that Congress intended that result. There simply is no such indication, and the decision below does not attempt to suggest any plausible reason for the distinction that could exist under this statutory scheme.

The court was drawn to its incongruous result by a need to reconcile Section 6(c)(3) and its incorporation of Section 6(c)(2) with Section 6(c)(4), which provides in part that "[a]ny order of suspension entered prior to a hearing before the Administrator shall be subject to immediate review in an action by the registrant or other interested person with the concurrence of the registrant in an appropriate district court." 7 U.S.C. 136d(c)(4). Section 6(c)(2) and Section 6(c)(4) can be reconciled, however, without abandoning the clear congressional intent to attach finality and unreviewability to suspension orders that are not subjected to further administrative consideration at the behest of registrants.

Section 6(c)(4) simply provides a limited opportunity for registrants or other interested parties to obtain court review of EPA's summary action while the issue of suspension is considered in a hearing. *Nagel* v. *Thomas,* 666 F. Supp. 1002, 1005-1006 (W.D. Mich. 1987); see *Dow Chemical Co.* v. *Blum,* 469 F. Supp. at 898, 901-902. The language of the provision makes that clear. First, review is available "prior to a hearing"; that necessarily implies that a hearing will be held. If no hearing will ever be held, as is the case here, then no review should be available. Second, what Section 6(c)(4) provides is "immediate review." That is a clear indication that judicial review is made available for the limited purpose of dealing with emergency situations pending a suspension hearing. To permit review

many months later violates that purpose and is unnecessary for the reconciliation of the various paragraphs of Section 6(c).[8]

Thus, the court of appeals has seriously misread the intent of Congress, rendering a decision that grants an additional remedy to nonregistrant users of a suspended pesticide. FIFRA, however, is a statute that Congress had repeatedly amended in an attempt to reconcile the various competing interests. See *Merrell* v. *Thomas,* 807 F.2d 776, 779 (9th Cir. 1986), cert. denied, 108 S. Ct. 145 (1987). Achieving an accommodation of the rights and interests of registrants and nonregistrants has been and remains a difficult and delicate task, which is complicated by the fact that registrants cannot be forced to manufacture and distribute any pesticide.

---

[8] The court's reliance (Pet. App. 14a-15a) on the legislative history of Section 6(c)(4) is misplaced. The majority opinion notes that the bill reported by the Senate Agriculture and Forestry Committee authorized the district court to grant relief only through the termination of suspension proceedings, whereas the final bill authorized such relief until the conclusion of the cancellation proceedings. But Section 6(c)(4)'s reference to what relief the district court might provide does not address the question whether the court has authority to review the suspension order as an initial matter. Furthermore, the change was the product of a disagreement between the Senate Agriculture and Forestry Committee and the Senate Commerce Committee, and not the result of the conference between the House and the Senate. The history of the dispute between the two Senate committees does not provide a conclusive explanation of this provision, but the compromise appears to have arisen from a desire to avoid multiple actions for judicial review of successive suspension decisions while cancellation proceedings were pending. See S. Rep. No. 970, 92d Cong., 2d Sess. 28 (1972); S. Rep. No. 838 (Pt. II), 92 Cong., 2d Sess. 47-49, 69, 71 (1972). Nowhere in the committee reports is there any indication that Congress wished to preserve an opportunity for judicial review of a suspension order when the registrants had waived any right to have further administrative review.

Consequently, as the Fifth Circuit has held, the rights of nonregistrants must be limited to the express provisions of the statute. *McGill* v. *EPA*, 593 F.2d 631, 636-637 (1979). Contrary to the decision of the court of appeals here, the express provisions of the statute can be reconciled without adopting the glaring incongruity accepted by that court. Neither the plaintiffs nor the court of appeals majority has offered any conceivable reason why Congress, having provided that suspension orders become final and unreviewable in *five days* if registrants waive their hearing right, should be ascribed the intent to permit judicial review at the behest of nonregistrants *six months* after the order became final.

2. Despite the manifest error by the court of appeals, we do not join petitioners in suggesting that this Court review the jurisdictional ruling of the court below. Petitioners concede that the decision below does not conflict with any decision of another court of appeals, and, contrary to petitioners' suggestion (Pet. 25), the opinion does not resolve the question of the availability of judicial review in a way that is in conflict with any decision of this Court. We do not read the decision as rejecting the "balanced approach to statutory construction" required by *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 350 (1984), in assessing the availability of judicial review. We agree with petitioners that the court of appeals' construction of Section 6(c)(4) of FIFRA is implausible when viewed in the context of "the statutory scheme as a whole," *Block*, 467 U.S. at 349, and that the court failed to identify any coherent legislative purpose that could explain its construction. Nonetheless, whatever the deficiencies of the court's analysis, it is clear that the decision rests primarily on what the court thought was " 'fairly discernible in the statutory scheme.' " Pet. App. 15a (quoting *Block*, 467

U.S. at 350-351). Thus, there is no direct conflict with the general principles of *Block* and, because *Block* and this case involve the interpretation of two different (albeit very similar) statutes, there is no conflict in specific result either.

Finally, petitioners' assertions that the effect of the decision below will be "to inhibit the Agency from using its emergency powers at all" (Pet. 26) and that "this Court may not have another opportunity to restore the EPA's authority" (Pet. 11-12) are speculative and overstate the deterrent effect of this decision on future agency actions. The agency does acknowledge that this decision may be a factor in its deliberations when it weighs the advisability of emergency action in the future, but the effect of this decision will not necessarily be controlling in a particular instance.

The mere fact that the decision of the court of appeals will afford certain parties additional opportunities for judicial review of agency action is not, in and of itself, likely to have a significant effect on the agency's decision whether to take emergency action in a given instance. Rather, the effect of the decision on the agency's deliberations in a particular instance would likely be contingent on whether there are practical implications bearing directly on the agency's ability to abate the hazard in question through emergency action.

For example, the Administrator may decide that a case presenting particularly difficult scientific issues is best adjudicated in a single administrative forum (*i.e.*, a suspension hearing) rather than a multiplicity of district courts. The agency may also be concerned about its practical ability to administer and enforce an emergency order in a context in which interested parties are likely to use judicial review in order to prevent finality and create uncertainty.

The prospect that such practical concerns would materially influence a given decision, however, is wholly conjectural.

The practical import of the decision below in a given instance will depend on specific factual issues such as the nature of the hazard, the particular crops and regions involved, the timing of any proposed action in relation to those activities that may entail hazardous exposure, and the interests and inclinations of those parties who might be adversely affected by the proposed action. Thus, although it may not be implausible that the decision would sometimes have a chilling effect on the agency's willingness to issue an emergency order, the effect will not be uniform or pervasive, nor will it operate automatically to foreclose future review of the jurisdictional issue presented by this case. Given the novelty of the issue that the court of appeals decided and the speculative nature of any claim that the issue has special importance, the decision below—although clearly incorrect—does not require this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

DONALD A. CARR
Acting Assistant Attorney General

ANNE S. ALMY
JOHN A. BRYSON
Attorneys

MARCH 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00179